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No. 82-52

IN THE

Supreme Court of the United States

October Term, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, and RICHARD RABAGO, MARGARET GRIFFITH, TED WILLIAMS, RUSS WEBB, WALTER NADSEN, DAVE CONNER and JACK LA SOTA, in their capacity as members of the GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS,

Petitioners,

vs.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF THE STATE OF CALIFORNIA (STATE TEACHERS' RETIREMENT SYSTEM) AS AMICUS CURIAE IN SUPPORT OF THE PETITION.

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TABLE OF CONTENTS

Page

Interest of the Amicus 1

Reasons for Granting the Petition 5

I.

The Arizona System Complies With the Holding in Manhart 5

II.

The Decision Below Is Revolutionary for the Insurance Industry 7

Conclusion 11

TABLE OF AUTHORITIES

Cases	Page
Equal Employment Opportunity Com'n v. Colby College (1st Cir. 1978) 589 F.2d 1139	8
Kahn v. Sherin (1974) 416 U.S. 351	9
Los Angeles Department of Water & Power v. Manhart (1978) 435 U.S. 702	4, 5, 6, 7, 11
Peters v. Wayne State University (Ed.Mich., S.D. 1979) 476 F.Supp. 1343	6, 7
Probe and Simmons, et al. v. State Teachers' Retirement System (Calif. Central Dist., Ct. No. CV-79-0522-MRP)	4
Schlesinger v. Ballard (1975) 419 U.S. 498	9
Women in City Govern. United v. City of New York (S.D.N.Y., 1981) 515 F.Supp. 295	5
Rules	
Rules of the Supreme Court of the United States, Rule 36	1
Rules of the Supreme Court of the United States, Rule 36.4	1
Statutes	
Cal. Educ. Code, § 22001 et seq.	2
Acts	
Civil Rights Act of 1964, Title VII	4, 5. 7

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NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

BRIEF OF THE STATE OF CALIFORNIA (STATE TEACHERS' RETIREMENT SYSTEM) AS AMICUS CURIAE IN SUPPORT OF THE PETITION.

This brief is filed on behalf of the State of California State Teachers' Retirement System, an amicus curiae, pursuant to Rule 36 in support of the petition for certiorari, previously filed herein on July 12, 1982. Consent of all parties is not required by reason of Rule 36.4.

Interest of the Amicus.

The State of California, by and through its State Teachers' Retirement System ("STRS"), operates a retirement system for school teachers in the State. STRS has more than

300,000 members, of whom approximately 120,000 are male and 190,000 are female.

It has almost 70,000 "service" retirees. Over 52,000 of the "service" retirees are female.

Under the California statutes providing a Retirement System for Teachers (Cal. Educ. Code, § 22001 *et seq.*) each teacher contributes the exact same amount to the System based upon his or her salary. Sex is not a factor. Monthly salary is the only relevant fact in computing the retirement contribution. Contributions to the System are also made by the public school district employers with some funding to the System from the State General Fund.

The Teachers' Retirement System provides at date of retirement to members similarly situated, male and female, a retirement allowance that is equal. At time of retirement two similarly situated male and female STRS members will have been making equal contributions and the basic unmodified benefit will be the same whether the retirant is a male or female. The normal standard form of service retirement benefits, the unmodified allowance, is computed by utilizing the factors of final compensation, years of service and retirement age. For example, any 60-year-old retiree (male or female) with a highest final[1] compensation of $2,000 per month and 32 years of service will receive a monthly retirement benefit of $1,280 until death. For convenience of computation, age 60 was selected. At age 60, the formula is $2,000 (highest monthly compensation) × 32 (years of service) × .02 (age factor). The result is the $1,280 per month retirement benefit.

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[1]The term "final compensation" is used to mean the average monthly compensation during the three highest years of compensation. Usually, this would be the final three years of employment.

An employee, upon retirement, may withdraw his/her accumulated contributions from the System. The person may take "his/her money" and invest it in real estate or in the stock market or in a poker hand. (This does not include contributions by the school district employers.)

The employee has other options at time of retirement — methods which he may voluntarily select to receive his or her retirement benefits. These voluntary option systems have certain similarities to the Arizona plan that this court is being urged to review.

This is how California's voluntary option selection works:

The retiree's basic retirement benefit or unmodified allowance is computed by reference to age, years of service and amount of "final" compensation. Then the "present value" of the retiree's benefit allowance is computed. By nominating an option beneficiary, the retiree chooses to insure the life of a potential survivor. The present value of the retirement allowance is paid out over two lives: the retiree's life and the option beneficiary's life.

When an option is chosen, the sex of the retiree is taken into account in determining the present value of retiree's unmodified allowance. The sex of both the retiree and his/her beneficiary is taken into account in determining the discount to be applied to the monthly benefit. Sex is not a factor in any computation other than the computation to figure the monthly benefits under the option system. The selection of an option is entirely voluntary. It is simply a method to collect the benefits established by statute.

Inasmuch as women (as a class) live longer than men, women who choose an option will tend to receive a higher monthly benefit than men because the present value of their unmodified allowance will tend to be greater due to the greater life expectancy of women.

In *Probe and Simmons, et al. v. State Teachers' Retirement System* (Calif. Central Dist., Ct. No. CV-79-0522-MRP), the State Teachers' Retirement System's option system was ruled to be a violation of Title VII of the 1964 Civil Rights Act, as construed by *Los Angeles Department of Water & Power v. Manhart* (1978) 435 U.S. 702.

The trial court ordered the State of California to "equalize" benefits for males and females under the option system, the cost of which may amount to $1,000,000 per month in a time of tightened budgets and for an agency already borrowing from the State's general fund.

The State of California is vitally interested in the instant matter because it deals directly with two arguments that the State of California has relied upon in its case before the federal courts. That is, the scope of the "open market" exception and the voluntary nature of the option system.

REASONS FOR GRANTING THE PETITION.

I.

The Arizona System Complies With the Holding in Manhart.

This court should grant certiorari in this matter and then decide that the Arizona system is in compliance with Title VII as construed by *Los Angeles Department of Water & Power v. Manhart, supra,* 435 U.S. 702.

The Arizona system is structured as an equal contribution plan. The employee selects the amount to be paid into the plan and there is no difference with regard to sex.

This fact itself distinguishes this case from *Manhart*. In *Manhart,* the females actually had less take-home pay than their male counterparts because they were compelled to pay in greater amounts to pension system under attack. (*Manhart, supra,* 435 U.S. 702, 704, 705.)

This fact also distinguishes this case from *Women in City Govern. United v. City of New York* (S.D.N.Y., 1981) 515 F.Supp. 295. In that case, the plan utilized sex-differentiated actuarial tables to compute both contributions and benefits. (*Id.*, at p. 298.) As a result, a woman employee also had less take-home pay then her male counterpart.

Therefore, this case is neither *Manhart* nor *City of New York*. Without question, Arizona is in compliance with the "equal contribution" dictate of the *Manhart* case. The attack on Arizona's scheme is on an entirely different plane than *Manhart* and on a plane not sanctioned or indicated by *Manhart* or its progeny. Indeed, as developed below, *Manhart* itself seems to allow or permit the features complained of in this case.

Secondly, the benefits as they are paid out are squarely within the "open market" exception of *Manhart*.

In *Manhart,* the Court stated:

> "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." (435 U.S. 702, 717-718.)

In effect, Arizona has done just this. The life annuities offered by the Arizona plan represent those available on the open market. Inasmuch as the parties stipulated at the trial court level that all insurance companies available to Arizona used sex-based mortality tables for their annuities, an employee could purchase no greater benefit on the open market than he could under Arizona's deferred compensation plan.

Therefore, this court should hold that the open market exception enunciated in *Manhart* controls this litigation.

Third, a prospective retiree may withdraw his/her contributions in a lump sum so that he/she may purchase the largest benefit available in the marketplace. This is exactly what this court sanctioned in *Manhart, supra,* at pages 717-718. Further, no one is "locked" into the system as was the case of *Peters v. Wayne State University* (E.D. Mich. 1979) 476 F.Supp. 1343, 1350.

Nonetheless, the Court of Appeals rejected the claim that the Arizona plan fell within the open market exception of *Manhart*. It ruled that although a lump sum option was available to employees to purchase the largest benefit which they could on the open market, Arizona was nevertheless liable because its plan also offered life annuities based on sex-based mortality tables. Although the life annuities simply reflected what was available on the open market, the Court of Appeals ruled that by offering the annuities as part of the plan, Arizona "discriminated" against women. (671 F.2d, at p. 335.)

Since Arizona offered only what the open market made available, it must be found to have satisfied the open market exception in *Manhart* if that exception is to have any meaning. The lump sum option was available to purchase anything desired on the open market and the additional option of life annuities simply gave employees the opportunity of further deferring their taxes.

Therefore, an important question has been raised. Does the Arizona plan comply with Title VII? The State of California joins with Arizona in asking this court to review whether the Court of Appeals' decision conflicts with *Manhart* by rendering meaningless the open market exception of *Manhart*.

II.

The Decision Below Is Revolutionary for the Insurance Industry.

In *Manhart*, at page 717, the following language is found:

> "(W)e do not suggest that the statute was intended to revolutionize the insurance and pension industries."

However, the decision in the court below will have the exact effect that this court warned about in *Manhart*. It is undisputed that women live longer than men. (*Los Angeles Department of Water & Power v. Manhart, supra,* 435 U.S. 702, 704, 707.) They outlive men at all ages. (*Peters v. Wayne State University, supra,* 476 F.Supp. 1343, 1347.)

That is the troublesome fact of life and like King Canute with his tides, this court and the insurance industry cannot ignore it. (*Equal Employment Opportunity Com'n v. Colby College* (1st Cir. 1978) 589 F.2d 1139, 1141.) The use of sex in mortality tables is not to use a social stereotype. It is the use of a fact. Women live longer than men.

The lower court's decision reflects a lack of appreciation with insurance mechanisms and principles. Whenever clas-

sifications are established, there will be differences among people within the particular classifications. That is the nature of classification or grouping. Only a relatively few persons in any class will die during a year. Only a relatively small percentage of *all* persons die during a year.

Classifications are not designed to predict an individual loss. Rather, they measure the loss potential of a group of persons with similar objective characteristics. With respect to any one individual, the fairness of a classification depends on characteristics rather than on experience, which is based to a degree on chance.

As explained by the National Association of Insurance Commissioners (NAIC) in its January 1978 presentation to Congress:

> "Insureds are grouped into classes to reflect essential differences in their actual or probable losses and expenses. An actuarially fair share is determined by reference to loss and expense experience of different classes (or individuals) *and by the expected effect of the insured's risk characteristics and underwriting factors* upon the insurer's costs. *It would be unfair discrimination from a statistical standpoint if the classes thus identified were not rated accordingly.*" (Emphasis added, *Statement on behalf of the NAIC* before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Committee of the Judiciary, January 17, 1978.)

An attack on the use of the classification of sex is an attack on the insurance process itself. In any classification, there are individuals whose actual experience will differ from the norm. However, every insured should contribute his/her fair share toward the risk involved. Only individuals who are exposed to comparable degrees of risk should be placed in the same premium class.

Grouping people by class, whether it be age, occupation, sex, etc., will create subsidization of some by others. It is imperative, for the sake of fairness, that the subsidization is by persons having equal (or as nearly equal as practical) probability of loss. The difference between male and female mortality is too great to group together in a single class. The probability of males living as long as females is not equal or nearly equal.

Equity and fairness require that whenever a group is large enough to produce reliable data and shows costs different from another group, that group's own rates should be used.

Equity requires providing equal costs for equal risks. This in turn requires that equal classes be treated equally AND that unequal classes *not* be treated equally. It is just as discriminatory to treat unequal persons equally as it is to treat equal persons unequally.

When it comes to mortality rates (or life expectancy) there is no equality between men and women. They should not be treated as though this troublesome fact did not exist. Sex is an objective, demonstrably relevant factor in computing life expectancy. To ignore it is to ignore a reality.

The crux of the instant case is whether men and women, similarly situated, are treated differently by the Arizona p[illegible]

First of all, it is permissible to recognize the differences between the sexes. (*Schlesinger v. Ballard* (1975) 419 U.S. 498, 508; *Kahn v. Sherin* (1974) 416 U.S. 351.)

But the real point is that men and women are not and cannot be "similarly situated" because nature has afforded women a longer life expectancy. A 60-year-old man and a 60-year-old woman are *not* similarly situated. She is expected to outlive him by three to five years. Of course, she may perish tomorrow and he may live to be 90 before he

dies, but any insurance-type system is based upon group principles. No one knows *who* will die tomorrow, but a very accurate estimate can be made as to *how many* people will die tomorrow. Arizona did not give its women employees a longer life expectancy and the insurers did not create the fact of lower female morality. Nature did and Arizona should be allowed to recognize a fact that everyone concedes to be true.

To restate the obvious, Arizona does not discriminate against women. Nature has done the discriminating because women, at all ages, outlive their male counterparts. Arizona's use of sex-based tables does not create any discrimination. It just reflects the existing reality.

To illustrate, if we were discussing fire insurance, we would want to know whether a brick building or a wooden building was more fire resistant when setting the insurance rates to be extracted for a certain pay-off. All things being fair and equal, we would not want to charge the owner of a more fire resistant building the same rate as we would charge the owner of the building more likely to catch fire.

The claim is made that unisex tables should be used by the insurance and pension industry. Many "no-sex-unisex" proponents contend that the reason there are different monthly pension benefits for the sexes results from the operation and working of dual mortality tables. This is not true. The real cause for the differences is not the dual mortality tables, but the dual mortality. If the sexes did not have different genetic characteristics and different biological makeups, there would be no differences. It is not the sexes themselves, but the characteristics that those sexes have that make the differences. A "no-sex-unisex" table merely gives the *appearance* that there is one mortality basis, one set of probabilities.

The facts are that the mortality basis for the sexes are different. A "no-sex-unisex" table would substitute appearance for facts.

Therefore, the decision below would "revolutionize" the insurance industry. Before any such drastic change in such a vital industry is compelled by judicial order, this court should grant the petition for writ of certiorari on file herein to review this case and the application of *Manhart*.

Conclusion.

For the foregoing reasons, amicus urges this court to grant the Petition for Writ of Certiorari filed by the State of Arizona and Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans.

Dated: September 1, 1982.

Respectfully submitted,

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